

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAY A. COLEN

Claimant

VS.

**FOODBRANDS SUPPLY CHAIN
SERVICES, INC.**

Self-Insured Respondent

Docket No. 1,039,642

ORDER

STATEMENT OF THE CASE

Respondent requested review of the January 21, 2009, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. William G. Manson, of Kansas City, Missouri, appeared for claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for self-insured respondent.

The Administrative Law Judge (ALJ) authorized Dr. Mark McGuire to treat claimant's right knee and leg.

The record on appeal consists of the transcript of the January 20, 2009, Preliminary Hearing and the exhibit, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant's injuries did not arise out of and in the course of his employment but, instead, were the result of the normal activities of day-to-day living. Respondent further argues that claimant's risk of injury was personal to claimant and, thus, his injuries are not compensable.

Claimant argues that his injuries arose out of and in the course of his employment, and that the Order of the ALJ should be affirmed.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by accident that arose out of and in the course of his employment with respondent?

- (2) Did claimant's disability result from a normal activity of day-to-day living?
- (3) Was the risk of claimant suffering injuries personal to claimant?

FINDINGS OF FACT

Claimant was an over-the-road driver. On December 12, 2007, he had been directed by respondent to take his truck to Overland Park to get a mirror repaired. While he was waiting for the repairs to be completed, he sat in a reclining chair in the waiting room. When he attempted to get out of the chair, he moved forward and the chair slipped backwards and he fell, injuring his right knee.

Claimant is 6 foot 2 1/2 inches tall and weighs about 410 pounds. He admitted that his size made it more difficult for him to get out of a chair than it would be for a lot of other people. His hands were on the arms of the chair as he was pushing himself up and out of the chair. Claimant testified that the floor of the waiting room was a waxed, shiny tile floor. He said he had gotten out of the chair before, and it had not moved. He said that when he got up out of the chair this particular time, the chair moved backwards. And when the chair moved, he lost his balance and fell.

Claimant stated that the recliner was similar to one that many people have in their homes. He said he had gotten up and out of that type of chair all his life.

Q. [by respondent's attorney] This is an activity of daily living that you do every day, isn't it?

A. [by claimant] Pretty much, yes, sir.¹

Claimant admits that he previously injured his right knee and leg while working for a past employer. He said his right knee and leg did not bother him after he left his previous employment.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.² Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.³

¹ P.H. Trans. at 11.

² K.S.A. 2008 Supp. 44-501(a).

³ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁴

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁵

K.S.A. 2008 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. . . .

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

⁴ *Id.* at 278.

⁵ K.S.A. 2008 Supp. 44-508(g).

In *Hensley*⁶, the Kansas Supreme Court set out three categories of risks: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

Where an employment injury is clearly attributable to a personal condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award can be granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.⁷

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.⁹

ANALYSIS

The respondent cites *Martin*¹⁰ as a case with similar facts that supports its position that claimant's injury did not arise out of the employment relationship with respondent. The worker in *Martin* had a history of back problems and alleged he injured his back when he exited his truck while at work. The Court of Appeals held that the worker's preexisting back condition was a risk personal to the worker and any everyday activity would have a tendency to aggravate his condition. Because this was a risk that was personal to the worker, the court concluded Martin's injury was not compensable. But the case at bar is distinguishable from *Martin* because here, claimant was not injured as he was rising from a chair. Rather, he was injured by a fall to the floor when the chair unexpectedly slipped on a slick floor and caused him to lose his balance and stumble forward. Claimant fell, striking his right knee on the tile floor. This case is distinguishable from *Johnson*¹¹ for the same reason.

⁶ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

⁷ *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, Syl. ¶ 2, 824 P.2d 1001, rev. denied 250 Kan. 804 (1992).

⁸ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁹ K.S.A. 2008 Supp. 44-555c(k).

¹⁰ *Id.*

¹¹ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091 (2006).

Although getting up from a chair could be described as a normal activity of day-to-day living, K.S.A. 2008 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this case there was a specific onset of injury. There is no allegation in this case that claimant's disability resulted from the effects of the ordinary wear and tear common to acts of everyday living on a preexisting condition.¹² Neither is this a case where claimant had a preexisting condition which was worsened or made symptomatic by a solely personal risk.¹³ This Board Member finds claimant's fall was the result of a risk associated with his job. Accordingly, this Board Member finds the injury that occurred to claimant from falling after getting up from the chair while in the course of performing his work duties constitutes an injury that arose out of the employment.

CONCLUSION

Claimant's injuries result from an accident that arose out of and in the course of his employment with respondent. Claimant's disability is not the result of normal activities of day-to-day living, and his injury was not the result of a solely personal risk.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated January 21, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2009.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William G. Manson, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Steven J. Howard, Administrative Law Judge

¹² See *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

¹³ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).